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Supreme Court, U.S.
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No. 95-1605

In the Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ
AND MARIO PEREZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MIGUEL GONZALES' BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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MIGUEL GONZALES' BRIEF IN OPPOSITION

Respondent, Miguel Gonzales, through counsel, hereby responds in opposition to the United States' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

FEDERAL SENTENCING GUIDELINES

United States Sentencing Commission Guidelines, (Nov. 1993), § 5G1.3

(hereinafter, "sentencing guidelines"), provides:

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.
- (c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

STATEMENT

In addition to the procedural history described by the United States in its Petition for Writ of Certiorari, the following is pertinent to Miguel Gonzales ("Gonzales"):

The underlying criminal conduct on which Gonzales' convictions were based took place in April, 1991. He was prosecuted and convicted in January, 1992 in a New Mexico state court. On March 10, 1992, he was sentenced to serve thirteen years in prison. His state sentence

incorporated a firearm enhancement. On May 8, 1992, while he was serving his state sentence, he was indicted in federal court for federal offenses arising out of the same course of conduct. He was convicted of some of the federal charges on June 18, 1993, and was sentenced on September 29, 1993. Although the district court ordered that Gonzales' sixty month sentence for the narcotics convictions would run concurrently with his state sentence, it believed that 18 U.S.C. § 924(c) required it to order that the federal five year firearm enhancement run consecutively to the state court sentence. (R. 121, TR 698-700).

Accordingly, since Gonzales' state sentence is longer than his concurrent federal sentence, the firearm enhancement must be served **after** the completion of both his state and federal sentences. Finding this result to be in conflict with the both the legislative history of § 924(c) and the applicable sentencing guidelines, the Tenth Circuit reversed, holding that--under the unique circumstances of this case--to read § 924(c) as mandating a consecutive sentence would lead to an absurd and unreasonably harsh result at odds with Congressional intent.

REASONS FOR DENYING THE PETITION

The United States urges that the petition be granted because, it contends, the Tenth Circuit's opinion is in conflict with the decisions of other courts of appeal and because it disagrees with the mode of statutory analysis relied on by the Tenth Circuit. It argues that because 18 U.S.C. § 924(c) is "an important and widely used statute," this case requires this Court's intervention and interpretation. None of these grounds supports granting the petition.

- 1. The Tenth Circuit's holding in this case does not have broad implications for federal law.**

Although 18 U.S.C. § 924(c) is frequently used to enhance the sentence of a defendant convicted for the use of a deadly weapon in conjunction with a federal crime of violence or drug

trafficking, the fact pattern of this case is unique and not likely to be repeated with any notable frequency. Furthermore, the Tenth Circuit's decision was narrow and confined to the specific facts before it. It decided only "whether § 924(c)'s "mandatory five-year sentence may run concurrently with a previously imposed state sentence that a defendant **has already begun to serve.**" United States v. Gonzales, 65 F.3d 814, 819 (10th Cir. 1995) (emphasis supplied by the court).

This holding will have absolutely no effect on the vast majority of cases in which § 924(c) is applied. Accordingly, there is no real need for this Court to intervene.

2. The Tenth Circuit properly interpreted § 924(c) so that its application under the circumstances of this case would not produce a result contrary to Congressional intent.

Contrary to the United States' argument, the mode of statutory analysis utilized by the Tenth Circuit was entirely in accord with well established methods of statutory construction. Even if the language at issue¹ is not ambiguous on its face, the Tenth Circuit's analysis was entirely appropriate. As it held, the strict application of the statute's apparent prohibition against

¹ At the time of the relevant offenses, § 924(c)(1) provided:

Whoever, during and in relation to any ... drug trafficking crime ... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime ..., be sentenced to imprisonment for five years.... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

concurrent sentences, **under these circumstances**, would be in direct conflict both with clear legislative intent and with the sentencing guidelines. In addition, it would lead to an absurd and unreasonable result in this case.

It is important to remember that Miguel Gonzales was the subject of two consecutive prosecutions based on the same acts: the first in state court and the second in federal court. He was already serving a lengthy state sentence incorporating a state firearm enhancement when he was convicted and sentenced under the federal statutes. Under these circumstances, it is not at all clear that § 924(c) prevents the federal court from ordering that the firearm enhancement be served concurrently with the state sentence.

In contrast, had this been a single, federal prosecution, the application of § 924(c) would have been quite clear: the federal firearm enhancement would be served consecutively to the term of imprisonment imposed for the crime in which the firearm was used or carried. Under such circumstances, § 924(c) would plainly prohibit an order that the enhancement run concurrently with the sentence imposed for the underlying crime. Indeed, the Senate Report accompanying the 1984 amendment to § 924(c) direct that "the Committee intends that the mandatory sentence under the revised subsection 924(c) be served **prior** to the start of the sentence for the underlying or any other offense." S.Rep. No. 225, 98th Cong., 2d Sess. 313-14, reprinted in 1984 U.S. Code Cong. and Ad News, 3182, 3492 (quoted in 65 F.2d 814 at 821) (emphasis added). In the vast majority of cases in which the statute is applied, this directive and the language of the statute do not conflict.²

² Indeed, the Committee Report goes on to describe the typical situation in which the application of § 924(c) is straightforward:

For example, a person convicted of armed bank robbery in

However, because Miguel Gonzales was already in prison at the time of the federal sentencing serving a sentence imposed by a state court for convictions arising out of the same conduct, it simply would not have been possible for him to serve his mandatory sentence under § 924(c) "prior to the start of the sentence for the underlying or any other offense." Id. Accordingly, the district court's assumption that § 924(c) required that the federal firearm enhancement run consecutively to his state sentence was contrary to Congressional intent as described in the Committee Report. By ruling that the firearm enhancement could be served concurrently with the state sentence and prior to the federal sentence, the Tenth Circuit effectuated both the language of § 924(c) and Congress' directions.

3. The mode of analysis the Tenth Circuit used was appropriate.

The United States urges this Court to disregard the Committee Report's clear mandate and to find the Tenth Circuit's analysis misguided and without precedent. It argues that the courts have no choice but to apply the literal language of § 924(c) even where the result of such application in a particular instance would be unreasonable and contrary to Congress' intent. To the contrary, the Tenth Circuit's refusal to do so in this case rests solidly on considerable precedent.

As this Court has repeatedly emphasized:

Where the literal reading of a statutory term would compel an odd

violation of section 2113 . . . (d) and of using a gun in its commission . . . would have to serve five years . . . before his sentence for the conviction under section 2113 . . . (d) could start to run.

Id.

result, we must search for other evidence of congressional intent to lend the term its proper scope. The circumstances of the enactment of particular legislation, for example, may persuade a court that Congress did not intend words of common meaning to have their literal effect. Even though, as Judge Learned Hand said, the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, nevertheless it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. . . . When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.

Public Citizen v. United States Dep't. of Justice, 491 U.S. 440, 454-55 (1989) (quoting Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989); Watt v. Alaska, 451 U.S. 259, 266 (1981); United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543-544 (1940); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.) and Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945)) and citing FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 432 (1986) and Church of the Holy Trinity v. United States, 143 U.S. 457, 472 (1892).

As the Tenth Circuit observed, [c]ommittee reports accompanying ultimately enacted bills are a favored authoritative source of legislative history." 65 F.2d at 823, citing Thornburg v. Gingles, 478 U.S. 30, 43 n. 7 (1986). As this Court noted in Thornburg in response to an argument that the Senate Report accompanying a bill should be given little weight: "[w]e have

repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill." *Id.*, citing *Garcia v. United States*, 469 U.S. 70, 76, and n. 3 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

Accordingly, the United States' contention that the decision of the Tenth Circuit "is insupportable under any mode of statutory analysis heretofore endorsed by this Court"³ is puzzling, at best. This Court has often relied on the Committee Report on a bill to ascertain legislative intent. The decision of the Tenth Circuit that the § 924(c) enhancement be served prior to the beginning of Gonzales' federal sentence and concurrently with his state sentence furthers that intent. Because Mr. Gonzales had already begun to serve his sentence when the § 924(c) enhancement was imposed, no other interpretation or application of that statute would further that legislative intent.⁴ As in *Thornburg*, this Court should disapprove the United State's argument that a statute should be interpreted in a manner that would conflict with clearly articulated Congressional intent.

4. Congress did not intend that § 924(c) apply to a state sentence that a defendant is already serving at the time he is sentenced on the federal conviction.

The Committee's instruction that the gun enhancement be served "prior to the start of the sentence for the underlying or any other offense," makes it clear that Congress did not intend that the term "any other term of imprisonment" would include a sentence arising from a prior state prosecution. Common sense and the system of dual sovereignty plainly preclude a

³ Petition at. p. 8.

⁴ See, also, *Johnson v. Matthews*, 751 F.Supp. 90, 92 (D.Kan. 1990) ("The legislative history of the amendment [to § 924(c)] clearly demonstrates that the mandatory sentence is to be served before any other").

congressional mandate that a federal sentence be imposed prior to the start of a state sentence, particularly when the state prosecution is initiated first and the defendant is already serving his sentence when the federal prosecution is initiated.

Moreover, as the Tenth Circuit reasoned, to apply the language of § 924(c) literally and as guided by the legislative intent set forth in the Committee Report would lead both to an absurd and an unreasonably harsh and unjust result. In order for Mr. Gonzales to serve the five year enhancement prior to his federal sentence but consecutively to his state sentence, he would serve first the thirteen years imposed by the state, then his federal gun enhancement, and then the sentence imposed for his narcotics conviction. As the Tenth Circuit observed, this would "more than double the custodial price that Congress and the Guidelines have set" for Mr. Gonzales' crimes. 65 F.3d at 821.

5. The Tenth Circuit's decision was consistent with the sentencing guidelines.

The applicable sentencing guidelines provide that where "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." See, sentencing guidelines § 5G1.3(b). It is well established that the intended purpose of that section "is to effectively credit for guidelines purposes defendants who have already served time--generally in another jurisdiction--for the same conduct or course of conduct." *United States v. Johnson*, 40 F.3d 1079, 1082 (10th Cir.1994) (quoting *United States v. Flowers*, 13 F.3d 395, 397 (11th Cir.1994)).

Thus, "[i]f the all-encompassing reading of Sec. 924(c) were adopted so that the

gun-charge sentence would have to follow the service of the entire pre-existing state sentence and precede the federal sentence covering the identical conduct, § 5G1.3's concurrent sentencing scheme would be rendered nugatory." 65 F.2d at 822. Courts should attempt to harmonize, rather than negate, the provisions of the sentencing guidelines in their application of federal sentencing statutes. See, United States v. Shewmaker, 936 F.2d 1124, 1128 (10th Cir. 1991), citing United States v. Fossett, 881 F.2d 976, 980 (11th Cir. 1989).

The United States' contention that guidelines § 2K2.4 (requiring the sentencing court to sentence a defendant convicted of a § 924(c) violation for the term set forth in that statute) commands a different result is misplaced. See, Petition at p. 11. The Commentary and Application Notes to that section specifically proscribe "double counting" where a previous sentence was based in any part on the use of a firearm.⁵ Accordingly, § 2K2.4 also supports the Tenth Circuit's result. See, also, ¶ 2 of the Application Notes to § 2K2.4 (proscribing an upward departure in excess of the maximum of the guideline range that would have resulted had there not been a conviction under § 924(c)).

Finally, ¶ 5 of the Application Notes to § 5G1.3 provides:

Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

The guidelines specifically endorse the Tenth Circuit's authority to adjust Mr. Gonzales' sentence so that it would not more than double the custodial price set for his crimes. In

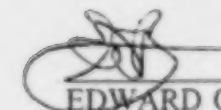
⁵ As noted above, Gonzales' state sentence incorporated a firearm enhancement.

short, neither § 924(c) nor the guidelines require that a defendant who received and is serving a state sentence of thirteen years and has received a five year federal sentence for the same conduct must serve his federal firearm enhancement consecutively and in addition to those sentences. To the contrary, such a ruling would be contrary to both clear congressional intent and the mandate of the sentencing guidelines. The Tenth Circuit used well recognized principles of statutory construction and appropriately harmonized the statute and the guidelines to further the goals of both. Its holding should not be disturbed.

CONCLUSION

For the foregoing reasons, this Court should deny the United States' Petition for a Writ of Certiorari.

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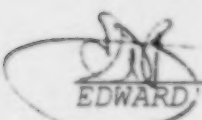
C E R T I F I C A T E O F S E R V I C E

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